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No. 1224

IN THE

Supreme Court of the United States

HOWARD PRESTON,

Petitioner,

-vs-

PHYLLIS PRESTON TYNER,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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PHYLLIS PRESTON TYNER,

Respondent.

PETITION FOR WRIT OF CERTIORARI

STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THE UNITED STATES SUPREME COURT IS INVOKED

Petitioner seeks a Writ of Certiorari for review of the judgment of the Court of Appeals of Fayette County, Ohio (*sub. nom. Phyllis Preston v. Howard Preston,* Case No. 389) entered September 28, 1967, affirming a judgment of the Court of Common Pleas of Fayette County, Ohio, entered February 24, 1967. Petitioner filed, in the Supreme Court of Ohio, a Motion to Certify (equivalent to Petition for Certiorari), which was overruled by the Supreme Court of Ohio on December 20, 1967.

Jurisdiction of the United States Supreme Court is invoked under 28 U. S. C. Section 1257:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> . . . .

(3) By writ of certiorari, . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of . . . the United States.

QUESTION PRESENTED

The question presented by this case is as follows:

The State Court made an order from the bench, orally, which had a substantial effect on the rights of the parties. The parties acted in reliance on said order for a period of seventeen years. It was then discovered that although an entry journalizing the order had been approved by counsel for both parties and filed with the clerk, it had never been signed by the judge or journalized. Is due process denied by refusal of the State Court to sign and journalize the omitted entry, *nunc pro tunc*?

CONSTITUTIONAL PROVISION INVOLVED

The case involves no statutes of the United States, and the only Constitutional provision involved is Article XIV, Section I, of the Amendments to the United States Constitution:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. [1 U.S.C. XLVII.]

STATEMENT OF THE CASE

In accordance with Ohio procedure, the caption of the case below at all times remained "Phyllis Preston, plaintiff (or plaintiff-appellee) v. Howard Preston, defendant

(or defendant-appellant)" regardless of changes in the position of the parties on appeal and regardless of subsequent changes in the name of Phyllis Preston. Howard Preston will be referred to herein as "petitioner" and Phyllis Preston Tyner as "respondent."

Petitioner and respondent were divorced on March 11, 1946, by decree of the Court of Common Pleas of Fayette County, Ohio. The parties had two children. Petitioner was given the custody of one child, and respondent the other. Petitioner was ordered to pay $7.00 per week child support to respondent, for support of the child awarded to respondent.

A little over a year later respondent filed with the same court a motion asking that petitioner be held in contempt for failure to pay support. This motion was heard on June 7, 1947. There is no transcript of the hearing, but it would appear that petitioner moved orally for a reduction in support payments to $5.00 per week. The court found petitioner in arrears $35.00 (five weeks at $7.00 per week), ordered him to pay the costs, to pay the arrearage at $10.00 per month during June, July and August, and ordered support payments reduced to $5.00 per week effective June 9, 1947. (First R. 19-20.)*

Counsel for one of the parties prepared an entry (Deft. Ex. A; First R. 16; Second R. 5), which was signed by both counsel as approved and was handed to the clerk. A handwritten notation "Hold for costs, send cost bill to Deft., Hillsboro" was made by someone in the upper left

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* It is necessary to refer to the "First Record" and "Second Record," due to the fact that the point under contention was tried once in the Court of Common Pleas of Fayette County on March 26, 1964 (Transcript, called "Bill of Exceptions," filed May 5, 1964) appealed to and reversed by the Court of Appeals of Fayette County, Ohio, and tried again by the Common Pleas Court of Fayette County on February 3, 1967 (Bill of Exceptions filed April 8, 1967). All exhibits admitted to evidence in the first trial were admitted by stipulation in the second trial.

hand corner of the entry, and the clerk on June 11, 1947 sent a bill to petitioner at Hillsboro, Ohio, for $3.93 costs (Deft. Ex. B; First R. 16; Second R. 5). Petitioner subsequently testified that he paid the $3.93 to his attorney, went with his attorney to the courthouse and waited outside the clerk's office while his attorney went in to pay the costs, and the attorney came out and told him everything had been done. (First R. 20-21). The entry was never signed by the judge or journalized, nor does the clerk have a record of the costs having been paid.

In various letters to petitioner, respondent acknowledged that she knew the child support order was for $5.00 per week. A number of letters were received in evidence, all addressed to petitioner and signed by respondent, and all postmarked at Galion, Ohio. None of these letters was denied by respondent.

In the letter of May 20, 1959, respondent said ". . . I know the Court only awarded me 5.00 . . ." (Deft. Ex. C; First R. 57; Second R. 5). In the letter of January 24, 1961 she said "You owe me for 16 wks counting Jan. $80.00," obviously computing at the rate of $5.00 per week and went on to say "your [*sic*] getting by pretty cheap with just 5.00 a week . . ." and, "So I'm giving you a chance to send me $80.00." (Deft. Ex. G; First R. 57; Second R. 5.) In her letter of September 7, 1962, the following lines appear:

"you are 23 wks behind
5

$115.00"

This letter again clearly indicated that she was figuring at the rate of $5.00 a week. (Deft. Ex. F; First R. 57, Second R. 5.) Her letter dated "Oct 6" and postmarked October 8, 1962 (Deft. Ex. E; First R. 57, Second R. 5)

complains to petitioner that he is behind in support payments, and lists the amount of the deficiency in the following language:

"March—Last 2 wks	10
April " " "	10
May	20
June	20
July	20
Aug	20
Sept	20
Oct—1 wk	5
	$125.00"

In her letter postmarked February 7, 1963 (Deft. Ex. H; First R. 57, Second R. 14) respondent complained to petitioner that "5.00 a wk isn't much, but when you get behind its a lot."

In her testimony at the hearing of March 26, 1964, respondent testified as follows on cross-examination (First R. 40):

> "Q. When you received your first payment of $5.00 per week for the minor child, did you question it at that time? A. I did at the time, but I didn't question it to anybody but myself. I wondered why.
>
> "Q. Would it be that you didn't question it, was that it was in reality reduced from $7.00 to $5.00 per week on June 11th, 1947? Would that be the reason?
>
> "A. Probably.
>
> "Q. It probably was then?
>
> "A. Yes."

After the verbal order of 1947 reducing the payments to $5.00 per week, and the filing of the unsigned, unjournalized entry, the matter remained dormant for seventeen years. As is indicated by the above exhibits and testimony, both parties to the case continued to calculate child sup-

port at the rate of $5.00 per week. The judge who had made the verbal order died, and so did the attorneys for both parties. The unjournalized entry gathered dust in a drawer in the clerk's office. On April 8, 1963, respondent filed a motion asking the court to hold petitioner in contempt. A hearing on this motion was held March 13, 1963. No evidence whatever could be found at that time to support petitioner's uncorroborated testimony that the court had ordered him to pay only $5.00 a week and he was found to be in arrears $2,783.00.

A subsequent search of the clerk's office turned up the unjournalized entry (Deft. Ex. A; First R. 16; Second R. 5) and on the strength of this as newly-discovered evidence the judgment previously rendered for the arrearage was set aside and a new trial granted, which was held March 26, 1964. At that trial, the Court of Common Pleas of Fayette County entered judgment against petitioner and in favor of respondent for $2,933.00 delinquent payments on child support, calculated at $7.00 per week. The court overruled petitioner's motion that the old entry be journalized *nunc pro tunc*. (Opinion, Appendix A.)

This decision was appealed to the Court of Appeals of Fayette County, Ohio, which reversed the Common Pleas Court on January 15, 1966. (Opinion, Appendix B.).

The final trial in the court of Common Pleas of Fayette County, Ohio, was held on February 3, 1967. At that trial the motion for an entry *nunc pro tunc* was renewed (Second R. 65). This motion was overruled and judgment entered for respondent in the amount of $2,481.00, and the court further fined the petitioner $500.00 and sentenced him to ten days in jail, giving him the opportunity to purge himself of the fine and sentence if he paid the judgment within sixty days. (Opinion, Appendix C; Entry, Appendix D.)

This judgment was affirmed on appeal by the court of Appeals of Fayette County on September 15, 1967 (Opinion, Appendix E; Entry, Appendix F.).

Petitioner filed a motion to certify (equivalent to a petition for certiorari in this Court) with the Supreme Court of Ohio, which motion was overruled by that court on December 20, 1967. (Entry, Appendix G.)

STAGE AND MANNER IN WHICH FEDERAL QUESTION WAS RAISED, AND HOW IT WAS PASSED UPON BY THE STATE COURT

Counsel for petitioner, in his memorandum supporting jurisdiction to the Supreme Court of Ohio, said:

> Secondly, every citizen of this state who stands before the bench and has a decision rendered has the right to rely upon such ruling and decision of the court. [Page 7]
>
> Every person who stands before the bench has the right to rely upon the order of the court. [Page 12]

Furthermore, counsel for petitioner, in oral argument before the Supreme Court of Ohio, specifically pointed out to the court that a violation of due process was involved in the case, and was permitted to argue that point. The Supreme Court of Ohio, however, has declined to certify that the constitutional question was raised and passed upon by said court.

ARGUMENT

Does due process of law, as guaranteed to the citizen by the Fourteenth Amendment to the Constitution of the United States, include a right to have court records speak the truth? If a citizen stands in a court of competent jurisdiction and hears the decree of that court pronounced from the bench, and then he and his opponent rely on the validity of that decree for seventeen years, does he have a federally-protected right to have that order entered on the journal when he finally discovers that journalization was omitted due to clerical error?

Counsel for petitioner admit that the case is one of first impression. So far as diligent research can discover, no question of a *nunc pro tunc* entry has been presented to this court for 118 years. In *Bank of Hamilton v. Dudley's Lessee,* 27 U.S. 492 at 522 (1829) this Court declined to interfere with a State Court decision holding a *nunc pro*

tunc entry void because not based on any substantial evidence that it was in fact a correction of an error. A similar holding was made in *Williamson v. Berry,* 49 U.S. 495 at 563 (1850). Neither case is dispositive of the issues presented by the instant case. In fact, the Fourteenth Amendment did not then exist.

The attitude of the lower federal courts may be gleaned from some of their cases. In *Ex Parte Buskirk,* 72 F. 14 (4th Cir., 1896) the court said that a *nunc pro tunc* order can be used only to correct inadvertent failure to journalize an order actually made. To the same effect see *Klein v. Southern Pacific Co.,* 140 F. 213 (C.C., D. Oregon 1905); *Hammond Hotel & Improvement Co. v. Chicago Title & Trust Co.,* 55 F.2d 168 (7th Cir., 1931); and *Rardin v. Messick,* 78 F.2d 643 (7th Cir., 1935).

In a number of criminal cases, the court has been allowed to correct its records, to the detriment of the defendant, by properly recording a sentence pronounced from the bench: *Peck v. United States,* 65 F.2d 59 (7th Cir., 1933); *Foster v. Zerbst, Warden,* 92 F.2d 950 (10th Cir., 1937) and *Kennedy v. Reid,* 249 F.2d 492 (D.C. Cir., 1957). Had the error in the sentence been adverse to the prisoner, could *he* have compelled the court to correct its records? It seems to counsel that this Court would so hold. But there is no case on the point.

Oddly enough, the same judge who failed to journalize his entry in petitioner's case made the same mistake at least one other time. That time he corrected his own error, during his lifetime, by a *nunc pro tunc* entry and his right to do so was affirmed by the Ohio Supreme Court, which went so far as to say that he had a duty to do it. This was the case of *State ex rel. Rogers v. Rankin, Judge,* 154 Ohio St. 23, 93 N.E.2d 281 (1950). Here it was said by the Supreme Court of Ohio (154 Ohio St. at 27, 93 N.E.2d at 284):

> "In the instant controversy the court actually ordered the dismissal of the divorce case vacated on September 3, 1948. However, the entry inadvertently was placed among other papers in the case without being signed or journalized. The respondent judge had not only the authority *but the duty* to correct this omission after it was discovered." [Emphasis added.]

There are many other Ohio cases sustaining the right and power of the court to correct its own errors by entries *nunc pro tunc.* But other than the above dictum about duty, there is nothing in Ohio law to say that a judge can be compelled to correct mistakes. The correction of judicial errors seems to be a one-way street: the court can correct them if it wants to. Where a judge dies or leaves office without having corrected his own errors, Ohio law leaves to the discretion of his successor whether corrections shall be made. *State ex rel. Egbert v. Leiser, Probate Judge,* 67 Ohio App. 350, 36 N.E.2d 874 (Butler County, Ohio, Court of Appeals, 1941); *State ex rel. Ruth v. Hoffman, Judge,* 82 Ohio App. 266, 80 N.E.2d 235 (Hamilton County, Ohio, Court of Appeals, 1947). The judge, in this situation, can do no wrong. To correct is within his power. Not to correct is within his discretion.

And so the Ohio courts have decided in the instant case. This holding is crystal-clear in the decision of the Court of Appeals of Fayette County in the first appeal (Opinion, Appendix B) where the court says:

> "Whether a court in the interest of justice should enter a judgment nunc pro tunc is a question which is in the discretion of the court. A successor judge has all the powers of a predecessor judge to change decisions which have not been journalized. . . .
>
> "*We conclude that the evidence clearly and convincingly shows that the predecessor judge ordered the claimed reduction to be made.* But, upon consideration of the facts shown by the record, we cannot say that the court has abused its discretion in refusing to enter a judgment nunc pro tunc." [Emphasis added.]

A reasoned regard for order, personal security and the dignity of the law require that the citizen be able to rely on what he is told from the bench, when he stands before a court of competent jurisdiction. If he has heard the order of the court, and it has been neither appealed nor challenged, he should not be told seventeen years later that the decree was invalid for reasons over which he had no control. For all of those seventeen years, both parties assumed the order's validity. Respondent never moved that support be increased, though she had the right to do so. Petitioner, had he known of the true state of the record, might have moved that support be reduced. His right to do that has been lost.

The Ohio courts have allowed respondent to take advantage of a clerical error, of which she, like petitioner, was ignorant for seventeen years. Those courts have recognized (yet chosen to disregard) clear and convincing evidence that she, like petitioner, firmly believed the order to be $5.00 per week because she, like petitioner, heard it decreed from the bench.

Citations to this Court's many definitions of due process of law would certainly be superfluous. The time has come for this Court to decide whether right to rely on the pronouncements of a court is embraced within that concept.

Respectfully submitted,

.....

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APPENDIX A

OPINION OF TRIAL COURT AFTER TRIAL OF MARCH 26, 1964

(Caption omitted.)

Comes now the court to consider the motion filed by Mr. James Kiger on March 26, 1964 in behalf of his client, Mr. Howard Preston, to request of the court for an order nunc pro tunc, directing that an entry be filed and recorded in the above captioned case. Defendant's counsel maintained that the order was made and never journalized by reason of mistake or error on the part of the Common Pleas Judge or Clerk of Court during the April term of Common Pleas Court, 1947.

Concerning the entry in question this court found the following facts were revealed at the hearing on March 26, 1964.

The Clerk of Courts, after much diligent search through an old file which contained various old papers from years ago, found the entry in question. This was the same Clerk who was in office at that time. She maintained that it was customary for the lawyer's to bring the entries to her pending the payment of costs, and at that time the entry was then taken to the Judge for approval and signature either by the lawyer or by her if the lawyer requested her to do it. The Clerk revealed that the costs were not paid—which was a prerequisite to the Judge approving, signing the entry, and having it journalized. The Clerk indicated that had the costs been paid to her she would have had a record of the payment. She found in her records that she billed the client for the costs but that there was no record of payment in her cash book.

The defendant and his brother testified that they paid the costs to the attorney and were told that "they were

taken care of". The attorney is now deceased. So is the Judge who was supposed to have presided over the hearing.

The defendant testified that he recalled that the Judge in open court at the contempt hearing in April, 1947, changed the amount of support from $7.00 to $5.00 that he was to pay each week for the support of his daughter. The defendant maintained this was the basis for the drawing of this entry in question by his lawyer.

The plaintiff, Mrs. Tyner, testified that the matter which was presented to the court (from which the defendant deduced the reduction of support payments) was an outcome of a contempt affidavit she had filed against Mr. Preston for failure to keep his support payments up to date and that this was a hearing on the contempt action. She could not recall any judicial order pertaining to the reduction of the support payments. She did not recall that Mr. Preston was there but did remember that his mother and brother was there, and had recalled that the mother said that she had burned her son's receipts because "I didn't think she (Mrs. Tyner) would do anything that dirty". (Meaning—file a contempt action.)

On the basis of the above evidence, which represents the highlights of the testimony during the hearing of March 26, 1964, it would be a stretch of the imagination for this court to feel that such evidence can come within the requirements as set out in 31 Ohio Jurisprudence, page 581, sections 104 and 105 on Admissibility of Evidence and Sufficiency of Proof. These sections contain the following language:

> 104—Admissibility of Evidence—The general rules relating to competency of evidence are applicable in hearings upon motions for the entry of judgments nunc pro tunc. There may be admitted in evidence not only the papers in the case and the minutes made by the judge, but also oral testimony of witnesses having personal knowledge of the actual rendition of the judgment, in connection with the recollection of the judge who rendered the decision,

although judicial action is ordinarily properly evidenced only by the record of a transcript thereof.

105—Sufficiency of Proof—Courts have power to enter judgments nunc pro tunc where the grounds therefor "appear satisfactorily to it." The power of a court of record to enter nunc pro tunc the evidence of judicial action previously taken should be exercised only upon sufficient evidence, upon evidence which shows clearly and convincingly that such former action was in fact taken. It cannot be granted upon mere guess, but must be grounded on personal recollection of the court, or from records or minutes or the testimony of witnesses having knowledge thereof. It has even been suggested that a nunc pro tunc order must be supported by a written memorandum, but the court recognized that this rule has not been applied in Ohio to its full extent. The evidence upon which the court acted is ample to authorize the order where the action of the court was duly entered upon the court docket.

With neither the Judge nor the attorney living, with no record of any kind made of the hearing, and with controverted testimony adduced at the hearing before this court as to what took place at the contempt hearing in June, 1947, there appears to be a complete absence of "clear and convincing evidence" to enable this court to order the entry filed nunc pro tunc. This does not appear to be a simple matter of correcting a clerical error but a very basic question as to whether the Judge made such an order, or whether it was just an agreed entry by counsel subject to the approval of the Judge. We cannot guess as to what happened. We must have clear and convincing evidence that such action was taken.

On the basis of the above reasoning, this court will overrule the Motion for an order nunc pro tunc filed in behalf of the defendant.

EVELYN W. COFFMAN
Judge, Common Pleas Court

APPENDIX B
OPINION OF COURT OF APPEALS ON FIRST APPEAL
Rendered January 15, 1966

(Caption omitted.)

SHERER, P. J.

This is an appeal on questions of law from a judgment rendered by the Common Pleas Court of Fayette County adjudging Appellant to be in contempt of a previous order of that court relating to child support and awarding Appellee a judgment against Appellant in the sum of $2933.00, for unpaid support up to and including March 26, 1964.

This judgment is based upon facts claimed to have followed a previous judgment of that court rendered in March 1946, divorcing the parties hereto and ordering Appellant to pay Appellee the sum of $7.00 per week for the support of their minor child.

The principal point of contention of Appellant is his claim that following the judgment of the Common Pleas Court of March 11, 1946, that he pay $7.00 per week for the support of the child, the court ordered that sum reduced to $5.00 per week during the April Term of 1947. It is his further contention that a journal entry was prepared for the judge's signature and approved by counsel; that said entry was never signed and filed by the court in this case; that he was billed for the costs incident to the filing of the entry; that he paid said costs and that the journal entry was submitted to the court for the judge's signature.

Appellant filed a motion in the Common Pleas Court requesting the court to journalize the court's claimed previous order rendered in 1947, reducing the support order from $7.00 to $5.00 per week nunc pro tunc as of June 1947. This motion was overruled, in effect, by the journal entry dated May 5, 1964, wherein the court ad-

judged the Appellant to be in contempt of the court's order of March 11, 1946 and awarded Appellee a lump sum judgment thereon in the sum of $2933.00, up to and including March 26, 1964.

At the hearing on the motions of Appellant and Appellee, the following evidence was received: The judge of the court presiding at the time of the claimed order of April Term 1947, as well as the attorneys for both parties, were then deceased. At the time of the motion recently heard before the court it was established that a journal entry was in the possession of the clerk of the court which had been approved by counsel for both parties, but was unsigned by the judge, which entry reduced the support payment from $7.00 to $5.00 per week. There was a note attached thereto made by the clerk which reads: "Hold for costs, send cost bill to defendant at Hillsboro." It was the opinion of the clerk that she must have been holding it for the costs at which time she would have presented it to the court for signature and filing. There is no record in the clerk's office of the payment of the costs. The cost bill was mailed to Appellant and is in evidence as Defendant's Exhibit B. There is a note on the cost bill as follows: "The entry cannot be filed until these costs are paid." There is evidence that both parties understood that the court had ordered such reduction. Appellant gave such testimony. A letter from Appellee to Appellant, Defendant's Exhibit C, postmarked May 20, 1959, states that Appellee knew that the court had made such reduction in the support payments. There is evidence, Defendant's Exhibit F, a letter from Appellee to Appellant postmarked September 27, 1962, which states that Appellant is 23 weeks behind and owes her $115.00. This letter states that Appellee arrived at the figure of $115.00 by multiplying 23 times 5. Another letter, Defendant's Exhibit G, postmarked January 24,

1961, from Appellee to Appellant, states that Appellant owes her $80.00 for sixteen weeks. Appellee testified at the hearing that she did not remember any such order.

The Record, at page 40 and following, shows that Appellee received payments of $5.00 per week from 1947 on, when she did receive payments. At Record 40, these questions and answers appear:

"Q. When you received your first payment of $5.00 per week for the minor child, did you question it at that time?

"A. I did at the time, but I didn't question it to anybody but myself. I wondered why.

"Q. Would it be you didn't question it, was that it was in reality reduced from $7.00 to $5.00 per week on June 11, 1947, would that be the reason?

"A. Probably.

"Q. It probably was then?

"A. Yes."

At Record 41, Appellee testified that she had no records to show that he did not pay in full for the year 1947 after Appellant was held in contempt. She stated that the only records would be his cancelled checks. She testified, Record 42, that she didn't exactly know what she received each year after 1947. She testified that at times payments were made to her mother and that some payments were made to the child. At Record 48, Appellee states that her prayer for judgment for $3276.00 arrearage was a rough estimate. At Record 60, Appellant testified that he had made the payments of $5.00 per week as ordered by the court in June 1947.

The power of the court to enter a judgment nunc pro tunc should be exercised upon any available evidence sufficient to show clearly and convincingly that a judgment was in fact previously rendered. 31 Ohio Jurisprudence 2d, Judgments, 571, Section 92, 581, 582, Section 105. Jack vs. Adamson 56 Ohio St. 395, 47 N. E. 48; Benedict

vs. State 44 Ohio St. 679, 11 N. E. 125. Appellee contends that the available evidence does not clearly and convincingly show that the court ever pronounced a judgment reducing the support payment from $7.00 to $5.00 per week. An examination of the court's opinion of May 5, 1964, upon which the judgment appealed is founded shows that the court arrived at the same conclusion.

The evidence tending to prove that the judge, now deceased, had in fact rendered such judgment is as follows: The Appellant testified that such reduction was ordered. An entry not signed by the judge, but approved by counsel for both parties, ordering such reduction, upon agreement of the parties, was found in the clerk's office and bears a note attached thereto "Hold for costs, send cost bill to defendant at Hillsboro." A cost bill sent by the clerk to Appellant is in evidence and bears this language: "The entry cannot be filed until the costs are paid." A letter from Appellee to Appellant, Defendant's Exhibit C, dated May 20, 1959, states that Appellee knew that the court had made such reduction in the support payment. Another letter from Appellee to Appellant, Defendant's Exhibit F, dated September 7, 1962, states that Appellant is twenty-three weeks behind and owes her $115.00. Another letter from Appellee to Appellant, Defendant's Exhibit G, dated January 24, 1961, states that Appellant owes her $80.00 for sixteen weeks. There is evidence in the record that Appellant was unemployed at the time the claimed reduction was made. There is also the testimony of Appellee, as we have noted at Page 40, to the effect that the $5.00 payments begun by Appellant instead of the $7.00 payments was probably due to the fact that the court had reduced the payments from $7.00 to $5.00 per week.

Whether a court in the interest of justice should enter a judgment nunc pro tunc is a question which is in the discretion of the court. A successor judge has all of the

powers of a predecessor judge to change decisions which have not been journalized. State ex rel. Egbert et al. vs. Leiser, 67 Ohio App. 350, 36 N. E. 2d, 874. State ex rel. Ruth vs. Hoffman, 82 Ohio App. 266, 80 N. E. 2d, 235.

We conclude that the evidence clearly and convincingly shows that the predecessor judge ordered the claimed reduction to be made. But, upon consideration of the facts shown by the record, we cannot say that the court has abused its discretion in refusing to enter a judgment nunc pro tunc. We see no merit in this assignment of error.

The second error assigned is that the Common Pleas Court erred in refusing to direct a verdict in favor of Appellant at the close of Appellee's evidence.

The case came before the Common Pleas Court on Appellee's motion for an order requiring Appellant to show cause why he should not be punished for contempt of the court's previous order of March 11, 1946, requiring him to pay $7.00 per week for the support of a minor child and for a lump sum judgment for arrearages in such support order in the sum of $3276.00.

Appellant waived any possible error on the part of the court in failing to direct such verdict when he proceeded with his defense. Halkias vs. Wilkoff Company, 141 Ohio St. 139, 47 N. E. 2d, 199.

The third error assigned is that the judgment of the Common Pleas Court adjudging Appellant to be in contempt of the court's order of March 11, 1946, and in awarding Appellee a lump sum judgment for arrearages in such support order in the sum of $2933.00 is manifestly against the weight of the evidence.

The evidence as to Appellant's arrearage under the support order is conflicting. At Record 38, Appellee testified that Appellant was in arrears in the sum of $3000.00 for the entire period of eighteen years, which amount she said was a rough estimate. At Record 38, she also stated that

Appellant had paid an average of $4.00 or $5.00 weekly throughout the eighteen years. In Defendant's Exhibit G, Appellee stated to Appellant on January 24, 1961, that he owed her $80.00 for sixteen weeks. In Exhibit F, a letter dated September 7, 1962, she stated that he was twenty-three weeks behind. In Exhibit I, dated October 19, 1962, she stated that Appellant owed her from May 1, 1962, on. In Exhibit H, dated September 7, 1963, she stated that he owed her $135.00.

We conclude from the evidence that the judgment in favor of Appellee for $2933.00 is manifestly against the weight of the evidence. It appears from the judgment entry that the court based its adjudication that Appellant was in contempt upon its finding that he was in arrears on his support payments in the sum of $2933.00, up to and including March 24, 1964. While we have held that such a finding is manifestly against the weight of the evidence, there is testimony from Appellant that he stopped payments in October 1963. There is some evidence that the minor child of the parties was employed for some part of this period of time but neither the length of her employment nor the amount of her earnings is shown by the evidence. This is a plausible explanation for Appellant's failure to comply with the court's order and in the absence of evidence showing a wilful and intentional violation of the court's order, the court erred to the prejudice of the Appellant in adjudging him to be in contempt. Taylor vs. Holmes, 96 Ohio App. 181, 121 N. E. 2d, 320.

Having concluded that the Common Pleas Court erred to the prejudice of Appellant in rendering judgment in favor of Appellee for the sum of $2933.00 and in finding him to be in contempt the court's judgment will be reversed and the cause will be remanded to that court for a new trial.

CRAWFORD and KERNS, JJ., concur.

APPENDIX C

OPINION OF TRIAL COURT AFTER TRIAL OF FEBRUARY 3, 1967

Filed February 20, 1967

(Caption omitted.)

Comes now the Court to consider the second re-trial of the motion to show cause as to why the defendant, Howard Preston, should not be held in contempt for the alleged delinquency in support payments to the plaintiff, Phyllis Tyner. This motion also requested the Court to reduce the delinquent payments to a lump sum judgment. The motion was filed April 8, 1963, by Mr. Rolland E. Laughbaum, and at this point the attorney for Mr. Preston is Mr. James Kiger. The evidence presently being considered was submitted at the trial on February 3, 1967. At that time counsel for plaintiff and defendant were present as well as the litigants themselves.

By stipulation all exhibits which were submitted in the previous trial were requested to be a part of this hearing. Although most of the information submitted to the Court during this hearing was repetitious to that in the other two hearings, there was some additional information elicited from Mrs. Tyner, the plaintiff, and Mr. Preston, the defendant, which tended to clarify some points in question.

Since this Court is the trier of the facts and has the added responsibility to believe or disbelieve any witnesses appearing before it, and since this Court has had the added advantage of hearing the same matter tried twice before and has taken considerable note of the demeanor of the litigants, there has been no small amount of time and thought involved in bringing this matter to this conclusion. In reviewing Mr. Preston's income history and working history, to-wit: that from 1947 to 1961 he was employed

throughout this entire period earning from $190 a month to $550 a month; that he was ill at no time during this period. In 1961 he went to work for Bretscher-Clark Associates in Columbus and in 1962 was earning between $100 and $160 a week. He testified that at no time during this employment was he ill so that he lost work because of it. Furthermore, the defendant purchased two homes during the period from 1947 until now. The most recent home was purchased in 1959 for $17,000 and the payments have all been made out of the defendant's income. Under these circumstances the first conclusion to be drawn is that if the Court should so find that he did not keep up his payments of $5.00 then he certainly should be found in contempt. According to his testimony his "actual earned money" in recent years has varied from $1200 a year to $160 a week. He always received advances from the company when he needed them.

The plaintiff in this matter, Mrs. Tyner, has testified that the letters which are submitted to the Court as exhibits in behalf of the defendant merely referred to the current or preceeding year to the date of the letters, rather than to the amount which the defendant owed through the previous years. She testified that she had kept account of his payments on calendars, some of which she had kept in her possession and some had already been destroyed. As the Court reviews each and every receipt which the defendant submitted, the monumental task which the plaintiff had of keeping track of the support payments coming in was certainly impressive. There was no regularity through the years of his payments and they could range from $5 to $35. Consequently, the receipts which the defendant possessed were the best evidence of the amount being paid to the plaintiff for the support of Carolyn Preston. The defendant testified that these receipts were

for only about 85 to 90% of the payments made. The question is, whether or not the Court can believe the defendant's testimony. There are several reasons besides the demeanor of the defendant himself which lead this Court to further question his varacity. First of all he admitted transferring his real property into the name of his present wife because "I travel and if I get killed everything is tied up in the Courts so she won't be able to do anything; as it is she will be able to go ahead and live". He also further explained in this hearing the testimony which he had given in the first hearing that his reason for transferring his house to his wife's name was to save her harmless of any money he owed to his company. He referred to this testimony himself in this last hearing when the Court asked him the question "Did you have any outstanding debts when you transferred this house?" His answer was, "What you are referring to is the account I had with the company, and I have a letter from the company stating that there is no possible way I could ever swindle them out of the money because my renewals belong to them as long as I owe them a dime; so they are secured on this indebtedness I have with the company because my renewals are their's as long as I owe them any money, so there is no way in the world anyone could try to swindle them out of that". The Court further asked him, "I just wondered why you put the property in your wife's name when you are making all the payments on it." He further answered, "Just that I travel all the time. If I get killed—I can't get any life insurance—if I get killed she has to have someplace to stay." He previously answered in this hearing that he put his property in his wife's name for the further reason that if he got killed everything would be tied up in the Courts so she wouldn't be able to do anything. This kind of activity on the part of the defendant would place his

creditors in a precarious position, whether it be the present plaintiff for his arrearage in support payments, or any other creditor, including his employer, for his employer must wait for repayment of monies advanced until the time for his renewals to come in. Since the wife did not put any money into this property and it was only by virtue of his income that the property was purchased, the explanations given by the defendant leave a lot to be desired as far as his willingness to deal fairly with his creditors.

The defendant further testified that during the years that he received the letters from Mrs. Tyner complaining about his delinquency he did owe back support but that he made up the arrears. There is no indication of any large lump sums or any effort through those years to increase his payments to allow for the arrearages. In fact, at no time through the years did the defendant, according to his receipts, make even his $5.00 payments current by the end of any one year. His payments were less in those years which the letters referred to than in most previous years. Even if the Court would have believed the defendant's testimony that 85 to 90% of the receipts were in the exhibits, the defendant still would have been in arrears over $100.00.

Because of the disregard that the defendant had as to his responsibilities to this daughter of his in not making the payments regularly and up to date, even the $5.00 a week, this Court has no alternative but to hold him in contempt.

The Court now has to consider the lump sum payment which is due and owing to the plaintiff for arrearages through the years. For the period from 1952 to the date which this motion was filed, which was April 8, 1963, the defendant did have receipts amounting to $2375. He should have paid $2925 for the period of time which he kept his

receipts from 1952 through April 8, 1963. Consequently he was in arrears $550.00 at $5.00 a week for that period.

Plaintiff's counsel renewed his motion requesting that the Court order the Clerk of Courts to enter an old, unsigned entry, marked Defendant's Exhibit A, which entry reduced the support payments from $7.00 to $5.00 a week. The Court continues to overrule the motion. (Said ruling was sustained by our Court of Appeals.) An additional reason to those having been given by this Court before for refusing to order the entry journalized is the following: At the time the order was supposedly made by the Court the defendant was unemployed, which no doubt was the reason for considering reducing the support payments. Five weeks thereafter the defendant was gainfully employed and for that reason the Court who made the alleged order might have changed his mind thereafter and chosen not to reduce the payments. For this additional reason the Court will still refuse to grant the defendant's motion.

And since the Court has heretofore ruled that defendant should have been paying $7.00 a week instead of $5.00, the arrearage at the rate of $2.00 a week from 1947 through April 1963 amounted to $1651. Then the defendant's total arrearage from 1947 through March 1963, amounts to $2341.00.

Now the Court must consider whether or not the defendant owes support for Carolyn Preston from October 1963 to the time at which she was emancipated by virtue of marriage, which date was February 8, 1966. The plaintiff testified that Carolyn worked from September 1963 through January 1964 when she received serious injuries as the result of an automobile accident, and that her earnings were around $43.00 a week for that period. She was out of work for six weeks following these injuries and did not return to work until around the middle of March

1964 and worked until October 1965 when she became unable to work further, and on February 8, 1966, she was married. She was still twenty at the time she was married. Since the support payments on a child legally run until she becomes an adult or is emancipated by working or marriage then we must now consider the number of weeks involved in the support of Carolyn until she was emancipated by marriage. Since she had illnesses through these periods when she did not work and the mother had the major responsibilities of her support, including medical bills which neither the child's earnings nor insurance could possibly cover, and in consideration of the fact the child never left the domicile of the mother, certainly the weeks in which the child was incapacitated the father should support this minor child. Consequently, at the rate of $7.00 a week, the father owes from January 1964 through February 8, 1966, twenty weeks, the sum of $140.00 for the child's support.

Considering the conclusions of this Court heretofore set out the Court hereby rules that the defendant is in contempt of Court and renders a lump sum judgment of $2481.00 in favor of the plaintiff and this Court further fines the defendant $500.00 and sentences him ten days in Jail, but will give him the opportunity to purge himself from both the fine and sentence if within 60 days from this date the lump sum judgment is paid in full.

/s/ EVELYN W. COFFMAN, *Judge.*

APPENDIX D

ENTRY OF TRIAL COURT FEBRUARY 24, 1967

(Caption omitted.)

This matter coming on for hearing before the Hon. Evelyn W. Coffman on the 3rd day of February, 1967, upon the second retrial of the Motion of the plaintiff praying for an order that the defendant be required to show cause why he should not be found in contempt for failure to pay support to a minor child in accordance to a former decree of this court, and to reduce such unpaid amount to a lump sum judgment, and upon the Motion of the defendant requesting the filing of an entry of June 7, 1947, nunc pro tunc. The Court finds both parties present with their attorneys.

Upon careful review and consideration of all the evidence adduced and testimony of both parties the court finds that since the year of 1947, the defendant is in arrears of support payments in the total sum of $2481.00 up to and including the 8th day of February, 1967 at which time the minor child was married, and that said defendant is in contempt of the former order of this court.

The Court further finds that the Motion of the defendant to file an entry of June 7, 1947, nunc pro tunc is not well taken and that such Motion should be overruled.

It is therefore Ordered, Adjudged and Decreed that the Motion of defendant to file an entry of June 7, 1947, nunc pro tunc is hereby overruled.

It is therefore Ordered, Adjudged and Decreed that the plaintiff be and is hereby granted a lump sum judgment against the defendant in the amount of $2481.00, on which execution is ordered to issue, and further fines the defendant $500.00 and sentences him to ten days in jail, and that such judgment is ordered to be paid in full by

defendant to the plaintiff within sixty (60) days hereof in order to purge himself of both the fine and sentence imposed for contempt of the former order of this Court.

It is further Ordered, Adjudged and Decreed that the costs in this matter be taxed to the defendant in the sum of $.....

EVELYN W. COFFMAN, *Judge*
Common Pleas Court.

APPENDIX E

OPINION OF COURT OF APPEALS ON SECOND APPEAL

Rendered September 15, 1967

(Caption omitted.)

SHERER, J.

Appellant is appealing on questions of law from a judgment of the Common Pleas Court of Fayette County, adjudging him to be in contempt of an order of that Court providing for child support, fining him $500.00 and costs, sentencing him to serve ten days in jail, and granting Appellee a lump sum judgment in the sum of $2,481.00 up to February 8, 1967, based upon the Court's prior support order of March 11, 1946, ordering Appellant to pay $7.00 per week for the support of a minor child.

Appellee's motions seeking orders holding Appellant to be in contempt and for a lump sum judgment for arrearages in support payments were filed on April 8, 1963. The matter came on for hearing in the trial Court on February 3, 1967. The record discloses several contempt actions beginning in April 1947. There is in evidence an unsigned entry which makes it appear that at a hearing in early 1947 the trial Judge, now deceased, orally ordered a reduction in support payments from $7.00 to $5.00 per week. This entry was approved by counsel for both parties but was never journalized. Both attorneys were deceased at the time of trial. The evidence discloses that Appellant was unemployed at the time of the first hearing in 1947 when the Court orally announced the reduction.

The record discloses that Appellant went back to work sometime in 1947 and has been continuously employed since that time. The evidence shows that from 1947 to 1961 Appellant earned from $190.00 to $550.00 per month. Record 12. In 1961, Appellant went to work for Bretscher-

Clark Associates and in 1962 was receiving from $125.00 to $160.00 per week in advances out of which he was required to pay his own travel expenses. The evidence is that his *earnings* in 1961 were $1,200.00.

The evidence shows that Appellant had gross income in 1963 of between $3,500.00 and $4,000.00. The record further shows that Appellant remarried in 1946 and that he and his wife purchased a home in 1950 with no down payment, and that in 1959 they sold their home, realizing $2,000.00 equity, and purchased a second home for $17,000.00, paying $2,000.00 down. The evidence discloses that Appellant made all monthly payments for said home out of his income.

The first error assigned is that the order of the trial Court adjudging Appellant to be in contempt of the Court order of March 11, 1947 is contrary to law.

Appellant renews his argument made in a previous appearance that he cannot be held in contempt of the order because he was under the impression that that order had been reduced to $5.00 per week and that there is no showing that he wilfully failed to pay the $7.00 per week. The validity of this argument depends on whether Appellant was in fact in arrears in his payments by computing these payments at $5.00 per week as orally ordered by the Court in April 1947. We have examined the trial Court's opinion to discover the answer to this question and find that the Court found that Appellant was in arrears in the sum of $550.00 for the period from 1952 to April 8, 1963, assuming that he was to pay $5.00 per week. This conclusion is supported by the evidence.

The second error assigned is that the lump sum judgment for $2,481.00 is manifestly against the weight of the evidence and contrary to law. Appellant for the second time argues that the support order of $7.00 per week made on March 11, 1946 was reduced to $5.00 per week. In the previous appeal this question was argued and this Court

held that although it clearly appeared that the trial Court orally reduced the support order from $7.00 to $5.00 per week in April 1947, the order was not journalized and the question of filing such entry nunc pro tunc was a matter resting within the discretion of the trial Court. In view of all the circumstances, we held that no abuse of discretion was shown in the trial Court's refusal to order the journalization of the entry making such reduction. We are of the same opinion still.

We have carefully considered the testimony of the witnesses and the exhibits which are a part of the bill of exceptions. The testimony of the witnesses is conflicting and there is a want of clear evidence, which is to be expected in a case where the Court is asked to compute weekly payments over a long period of time such as here, from 1946 to 1966. The record discloses that Appellant made his payments to the Appellee, her mother, and to the minor child. Such confusion might have been avoided had the trial Court ordered the Appellant to make his payments through the office of the Clerk of the Courts. In arriving at its conclusion as to the arrearage in support payments due the Appellee, the Court indicates in its opinion that it gave greater credence to the testimony of the Appellee than to that of the Appellant. The credibility to be given to the testimony of a witness is peculiarly within the province of the trial Court. We conclude that there is sufficient evidence to support the judgment and that it is not contrary to law.

Finding no error in the action of the trial Court prejudicial to the Appellant, the judgment will be affirmed.

CRAWFORD, P.J. and KERNS, J., concur.

APPENDIX F

ENTRY OF COURT OF APPEALS

Filed September 28, 1967

(Caption omitted.)

This matter came on to be considered on the 15th day of September, 1967, before the Hon. Calvin Crawford, Joseph D. Kerns and Paul Sherer upon the Appeal Briefs and other matters of record, argument of Counsel having been waived by both parties.

After due consideration this Court finds no error in the action of the trial court prejudicial to the appellant.

It is therefore ordered, adjudged, and decreed that the judgment of the Common Pleas Court of Fayette County is hereby affirmed and that it proceed according to law to the execution of such final orders as may be proper.

CALVIN CRAWFORD, *Judge*
JOSEPH D. KERNS, *Judge*
PAUL SHERER, *Judge.*

APPENDIX G

ENTRY OVERRULING MOTION TO CERTIFY

THE SUPREME COURT OF THE STATE OF OHIO
1967 Term

No. 41341

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR FAYETTE COUNTY TO CERTIFY ITS RECORD

THE STATE OF OHIO,
City of Columbus.
PHYLLIS PRESTON (TYNER),
Plaintiff-Appellee,

vs.

HOWARD PRESTON,
Defendant-Appellant.

It is ordered by the Court that this motion is overruled. Costs:

Motion Fee, $20.00, paid by J. A. Kiger.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this..... day of ..... 19.....

.....*Clerk*

.....*Deputy*